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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAWN RUTHERFORD,

No. C 07-06426 WHA

Plaintiff,

v.

SCENE 7 INC. LONG TERM DISABILITY
PLAN, PRUDENTIAL INSURANCE
COMPANY OF AMERICA,

Defendants.

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT;
GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
REQUEST FOR FURTHER
DISCOVERY**

INTRODUCTION

In this disability-benefits action, plaintiff Dawn Rutherford sued defendants Scene 7, Inc. Long Term Disability Plan, and Prudential Insurance Company of America under the Employment Retirement Income Security Act. Ms. Rutherford claimed that Prudential, the claims administrator for the plan, wrongfully terminated her long-term disability benefits. Defendants now move for summary judgment on the ground that Prudential's termination decision was proper because Ms. Rutherford's claimed disabilities were either primarily self-reported or due to mental illness. For the reasons stated below, defendants' motion is **GRANTED IN PART AND DENIED IN PART**. Ms. Rutherford's request to seek additional discovery is also **GRANTED IN PART AND DENIED IN PART**.

1 **STATEMENT**

2 Ms. Rutherford was hired to work as a software product producer for Scene 7, Inc.,
3 on July 16, 2001. She participated in the employee-benefit plan offered by Scene 7, Inc.
4 Prudential was the claims administrator. The Plan provided (PRUR 1147):

5 Disabilities due to a sickness or injury which, as determined by
6 Prudential, are *primarily based on self-reported symptoms* have a
7 limited pay period during your lifetime. Disabilities which, as
8 determined by Prudential, are due in whole or part to *mental illness*
also have a limited pay period during your lifetime. The limited
pay period for self-reported symptoms and mental illness
combined is 24 months during your lifetime.

9 * * *

10 *Self-reported symptoms* means the manifestations of your
11 condition, which you tell your doctor, that are not verifiable using
12 tests, procedures and clinical examinations standardly accepted in
the practice of medicine. Examples of self-reported symptoms
13 include, but are not limited to headache, pain, fatigue, stiffness,
soreness, ringing in ears, dizziness, numbness and loss of energy.

14 *Mental illness* means a psychiatric or psychological condition
15 regardless of cause. Mental illness includes but is not limited to
schizophrenia, depression, manic depressive or bipolar illness,
anxiety, somatization, substance related disorders and/or
16 adjustment disorders or other conditions. These conditions are
usually treated by a mental health provider or other qualified
provider using psychotherapy, psychotropic drugs, or other similar
17 methods of treatment as standardly accepted in the practice of
medicine.

18 Appended to the Plan was a section entitled, "This ERISA Statement is not part of the Group
19 Insurance Certificate." The first paragraph stated that "[t]he Prudential Insurance Company of
20 America as Claims Administrator has the sole discretion to interpret the terms of the Group
21 Contract, to make factual findings, and to determine eligibility for benefits. The decision of the
22 Claims Administrator shall not be overturned unless arbitrary and capricious" (PRUR 1162).

23 Ms. Rutherford made her first claim for Plan benefits on August 28, 2001, over a month
24 after she began working. When asked to describe the nature of her illness, she wrote,
25 "Extreme fatigue, nausea, headaches, lower back pain, feverish, muscle and joint pains"
26 (PRUR at 865). As a result, she received disability benefits.

27 In December 2001, Prudential terminated Ms. Rutherford's long-term benefits under the
28 Plan, based on a review by Dr. Gwen Brachman. Dr. Brachman had concluded that, "to a

1 reasonable degree of medical certainty," Ms. Rutherford was "not physically impaired from
2 performing essential functions" of her own occupation (PRUR 887). Plaintiff appealed.

3 Prudential referred her file to Dr. Stephen Gerson for review. He found that she met the
4 criteria for a diagnosis of fibromyalgia, chronic fatigue syndrome, and severe depression.
5 She also reacted poorly to medication and was frequently bedridden. In his lengthy letter dated
6 April 26, 2002, Dr. Gerson listed the documents he reviewed to arrive at his conclusions.
7 Of interest is a note from Dr. Michael Kurtz, in which he reported on the treatment for
8 Ms. Rutherford's "ongoing disabling condition of fibromyalgia, degenerative cervical and
9 lumbosacral spine disease. He reports multiple trigger points and he has prescribed physical
10 therapy" (PRUR 481).

11 Accordingly, Prudential reinstated Ms. Rutherford's benefits in May 2002. The letter
12 noted that she had a preexisting condition under the definitions of the Plan. The preexisting
13 symptoms, which emerged after her May 2001 layoff (but before her July 2001 start date).
14 included severe exhaustion, nausea, forgetfulness, flashes, generalized tender points, heaviness
15 to the upper extremities, and difficulty sleeping. The benefits were therefore approved only on
16 the basis of her psychiatric condition.

17 Over the next year, Ms. Rutherford continued to complain of pain, sleep disorders,
18 side effects due to medication, and mental illness. She took medication, including
19 antidepressants and pain medications. She consulted with numerous physicians, many of
20 whom diagnosed her with, *inter alia*, fibromyalgia. Some of them wrote letters on her behalf,
21 recommending that her disability payment period be extended.

22 In April 2003, Prudential sent Ms. Rutherford a letter advising her of the mental-illness
23 limitation under the Plan and saying that her benefits were only authorized through
24 November 11, 2003. Because her benefits had been reinstated only on the basis of
25 Ms. Rutherford's mental illness, Prudential would only provide 24 months of benefits.
26 The letter further stated that there were no objective medical records (e.g., x-rays or MRI
27 reports) that supported a claim of physical problems.

28

1 Ms. Rutherford made three appeals — in September 2003, July 2005, and May 2007.
2 Each time, she asserted that she continued to suffer from physical and mental disabilities.
3 Prudential would then refer her file to physicians who concluded that nothing in
4 Ms. Rutherford's file justified reinstating disability benefits. Prudential upheld its earlier
5 termination decision in each of the appeals. In July 2007, Prudential notified Ms. Rutherford of
6 its final decision to terminate her long-term disability benefits.

7 Ms. Rutherford filed suit against defendants on December 20, 2007, alleging that
8 Prudential improperly and wrongfully denied her disability benefits. She sought to recover
9 benefits, reasonable attorney's fees and costs, and injunctive relief pursuant to ERISA,
10 29 U.S.C. 1132.

11 ANALYSIS

12 Summary judgment is granted when "the pleadings, depositions, answers to
13 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
14 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
15 matter of law." FRCP 56(c). A district court must determine, viewing the evidence in the light
16 most favorable to the nonmoving party, whether there is any genuine issue of material fact.
17 *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007). A genuine issue
18 of fact is one that could reasonably be resolved, based on the factual record, in favor of either
19 party. A dispute is "material" only if it could affect the outcome of the suit under the governing
20 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).¹

21 The moving party "has both the initial burden of production and the ultimate burden of
22 persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
23 Cos., Inc.*, 210 F. 3d 1099, 1102 (9th Cir. 2000). When the moving party meets its initial
24 burden, the burden then shifts to the party opposing judgment to "go beyond the pleadings and
25 by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file,
26 designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*,
27 477 U. S. 317, 324 (1986).

28 ¹ Unless indicated otherwise, internal citations are omitted from quoted authorities in this order.

1 Although Prudential is the moving party, Ms. Rutherford argues that the Court should
2 *sua sponte* grant summary judgment in her favor. “It is generally recognized that a court has
3 the power *sua sponte* to grant summary judgment to a non-movant when there has been a
4 motion but no cross-motion.” *Kassbaum v. Steppenwolf Productions, Inc.*, 236 F.3d 487, 494
5 (9th Cir. 2000). The propriety of granting summary judgment in favor of a non-moving party
6 is, however, a “close question.” *Ibid.* “[G]reat care must be exercised to assure that the original
7 movant has had an adequate opportunity to show that there is a genuine issue and that his
8 [or her] opponent is not entitled to judgment as a matter of law.” *Ibid.*

9 **1. LEGAL STANDARD.**

10 This order must first determine the applicable standard of review in resolving this
11 ERISA dispute. District courts must review ERISA benefit-denial claims *de novo* unless the
12 plan administrator or fiduciary unambiguously retained the discretion to grant or deny claims.
13 Otherwise the standard is the more lenient abuse of discretion. *Feibusch v. Integrated Device*
14 *Technology, Inc. Employee Benefit Plan*, 463 F.3d 880, 883 (9th Cir. 2006). If *de novo* review
15 applies, a district court “simply proceeds to evaluate whether the plan administrator correctly or
16 incorrectly denied benefits, without reference to whether the administrator operated under a
17 conflict of interest.” *Ibid.*

18 Under an appended section entitled, “This ERISA Statement is not part of the Group
19 Insurance Certificate,” the Plan stated: “The Prudential Insurance Company of America as
20 Claims Administrator has the sole discretion to interpret the terms of the Group Contract,
21 to make factual findings, and to determine eligibility for benefits. The decision of the Claims
22 Administrator shall not be overturned unless arbitrary and capricious” (PRUR 1162).
23 This language unambiguously confers discretion to the plan administrator. *See e.g., Jordan v.*
24 *Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 875 (9th Cir. 2004); *Bergt v.*
25 *Ret. Plan for Pilots Employed by MarkAir, Inc.*, 294 F.3d 1139, 1142 (9th Cir. 2002).

26 Facially, abuse of discretion appears to be the appropriate standard. There is, however,
27 a wrinkle. In its moving papers, Prudential “stipulates that the Court’s review will be *de novo*”
28 (Br. 13). Plaintiff does not dispute this. As a matter of fact, she states in her opposition

1 memorandum: "Prudential has 'stipulated' to a *de novo* adjudication by the court in this matter.
2 Therefore the court need not concern itself with any multi-layered conflict-of-interest analysis,
3 and may proceed directly to decide whether Ms. Rutherford's benefits were incorrectly
4 terminated" (Opp. 2). Accordingly, per both parties' wishes, this order will review the ERISA
5 dispute *de novo*.

6 **2. CONTRACTUAL LIMITATIONS.**

7 Prudential contends that plaintiff's disability benefits were rightfully terminated.

8 The Plan provided (PRUR 1147) (emphasis added):

9 Disabilities due to a sickness or injury which, as determined by
10 Prudential, *are primarily based on self-reported symptoms* have a
11 limited pay period during your lifetime. Disabilities which,
12 as determined by Prudential, are due in whole or part to mental
illness also have a limited pay period during your lifetime.
The limited pay period for self-reported symptoms and mental
illness combined is 24 months during your lifetime.

13 Because Ms. Rutherford's claimed disability arose out of mental illness or self-reported
14 symptoms, Prudential says, this contractual limitation applied. Ms. Rutherford claims that she
15 suffered from fibromyalgia, sleep disorder, side effects from medication, and depression.
16 She does not dispute that her claim of mental illness is subject to the 24-month benefits
17 limitation. This order therefore focuses on her other claimed illnesses.

18 According to Prudential, Ms. Rutherford's claim for fibromyalgia was primarily based
19 on self-reported symptoms. The Plan defined self-reported symptoms as "manifestations of
20 your condition, which you tell your doctor, that are not verifiable using tests, procedures and
21 clinical examinations standardly accepted in the practice of medicine" (PRUR 1148). In a letter
22 dated March 26, 2006, Dr. April Campbell responded to the question of whether Ms. Rutherford
23 had functional impairments from November 12, 2003, forward: "Actually, I cannot answer that
24 question because the records that I have are woefully lacking in a well-detailed physical exam
25 of Ms. Rutherford" (PRUR 212). She further stated, "The diagnosis of fibromyalgia is
26 self-reported because it is based entirely on the subjective complaints of tenderness at various
27 points along the body. The only possible objective finding regarding the diagnosis of
28 fibromyalgia is the sleep study that was performed that showed some alpha wave intrusion and

1 a decrease in her stage 3 and 4 sleep. However, these findings are not specific to fibromyalgia
2 and can actually be found in normal individuals as well as in dysthymic, *i.e.*, depressed
3 individuals, and those who have experienced viral illnesses. So, I would hesitate to make the
4 diagnosis of fibromyalgia based entirely on a sleep study" (PRUR 214). In summer 2006,
5 Dr. Alan Kimelman observed Ms. Rutherford claiming pain everywhere, talking loudly,
6 using profanity on occasion to express the severity of pain, frequently interrupting the
7 examination to complain of pain, "behaving as though she had never participated in a standard
8 medical examination to assess range of motion," requesting that her husband assist with all
9 activities, and requesting frequent repetitions of examination instructions. These behaviors
10 "all corroborate symptom magnification," he said (PRUR 185).

11 This evidence, *inter alia*, showed that Ms. Rutherford based her claim of fibromyalgia
12 on self-reported symptoms, Prudential says. In *Jordan v. Northrop Grumman Corp. Welfare*
13 *Benefit Plan*, 370 F.3d 869 (9th Cir. 2004), the plaintiff worked as a senior administrative
14 assistant and described her job as "typing, filing, telephone, sitting, walking, standing,
15 general administrative office procedures." The symptoms included pain in her hands, fingers,
16 lower back, feet, and legs. She consulted with a number of physicians and was diagnosed with
17 fibromyalgia. The plaintiff then claimed that she was totally disabled by fibromyalgia and tried
18 to obtain disability benefits. The plan administrator denied her disability claim on the ground
19 that while fibromyalgia may have limited some of her activities, the condition was not
20 sufficiently severe as to prevent her from working at her sedentary occupation. She appealed
21 the decision and produced letters from her physicians stating that she could not work because of
22 her fibromyalgia. After several unsuccessful appeals, the plaintiff filed suit in district court.
23 The district court granted summary judgment against the plaintiff, holding that the denial of
24 benefits was proper. The Ninth Circuit affirmed; the plan administrator did not act arbitrarily
25 where the plaintiff's treating physicians failed to respond to inquiries for more detailed
26 information.

27 Although the Ninth Circuit in *Jordan* did not reach its decision on the basis of the
28 plaintiff's symptoms, the court of appeals described fibromyalgia:

1 This syndrome, formerly called fibrositis, has traditionally been
2 used for “an ill-defined, poorly understood set of symptoms,
3 consisting of aching pain and stiffness in one or several parts of
4 the body.” As we have previously explained, fibromyalgia’s cause
5 or causes are unknown, there is no cure, and, *of greatest
6 importance to disability law, its symptoms are entirely subjective.*
7 There are no laboratory tests for the presence or severity of
8 fibromyalgia. “The ‘consensus’ construct of fibromyalgia
9 identifies the syndrome as associated with generalized pain and
10 multiple painful regions . . . Sleep disturbance, fatigue, and
11 stiffness are the central symptoms,” though not all are present in
12 all patients. The only symptom that discriminates between it and
13 other syndromes and diseases is multiple tender spots, which we
14 have said were eighteen fixed locations on the body that when
15 pressed firmly cause the patient to flinch . . . Objective tests are
16 administered to rule out other diseases, but do not establish the
17 presence or absence of fibromyalgia.

18 *Id.* at 877 (emphasis added). Accordingly, Ms. Rutherford’s diagnosis of fibromyalgia is no
19 more than a collection of subjective symptoms that fell under the Plan’s 24-month limitation,
20 defendant says.

21 Not necessarily. Nowhere in *Jordan* — or any other Ninth Circuit decision —
22 did the court of appeals say that a diagnosis of fibromyalgia was not enough to show disability.
23 Moreover, *Jordan* did not deal with a “self-reported symptoms” limitation. Instead, other
24 circuits have ruled that fibromyalgia can be the basis of a valid claim.

25 The facts of an Eighth Circuit case closely mirror the facts here. In *Chronister v. Baptist*
26 *Health*, 442 F.3d 648 (8th Cir. 2006), the plaintiff was diagnosed with fibromyalgia. Her policy
27 also had a 24-month limitation that stated: “Disabilities, due to sickness or injury, which are
28 primarily based on self-reported symptoms, and disabilities due to mental illness have a limited
pay period up to 24 months.” *Id.* at 655. The plan administrator therefore limited the plaintiff’s
benefits, contending that fibromyalgia was only verifiable through patient self-report.

29 The Eighth Circuit disagreed. According to the policy, self-reported symptoms were
30 defined as “the manifestations of your condition which you tell your doctor, that are not
31 verifiable using tests, procedures or clinical examinations standardly accepted in the practice of
32 medicine.” *Id.* at 656. In *Chronister*, a physician had diagnosed the patient with fibromyalgia
33 with the use of an eighteen-point “trigger test.” The Eighth Circuit held that this test qualified
34 as a clinical examination standardly accepted in medicine, so the plaintiff’s fibromyalgia was

1 not subject to the self-reported symptoms limitation. The Eighth Circuit stated that the district
2 court had correctly remanded the matter to the plan administrator for further proceedings.

3 *See also Post v. Hartford Ins. Co.*, 501 F.3d 154, 173 n. 13 (3d Cir. 2007) (“The ‘trigger point’
4 test is recognized in the case law and the medical literature as a prerequisite to a diagnosis of
5 fibromyalgia”); *Sarchet v. Chater*, 78 F.3d 305, 306–07 (7th Cir. 1996) (discussing the
6 eighteen-point trigger test); and *Stup v. UNUM Life Ins. Co. of America*, 390 F.3d 301, 303
7 (4th Cir. 2004) (discussing how doctors diagnose fibromyalgia based on the tenderness of at
8 least eleven of eighteen standard trigger points on the body). This order agrees with the
9 reasoning by the other circuits. Accordingly, as long as Ms. Rutherford’s fibromyalgia was
10 diagnosed by a clinical examination standardly accepted in medicine (e.g., the trigger test),
11 her claim did not fall under the self-reported symptoms limitation.

12 In her opposition memorandum, Ms. Rutherford has pointed to the following as
13 evidence of fibromyalgia (Opp. 3–6):

14 (1) Dr. Michael Kurtz wrote a one-page letter on September 26,
15 2001, which stated, “She also has fibromyalgia” (PRUR 827).

16 (2) On a one-page “duty status report” dated October 11, 2001,
17 Dr. Kurtz diagnosed Ms. Rutherford with fibromyalgia (PRUR
18 823).

19 (3) Ms. Rutherford prepared a more detailed letter summarizing
20 her own symptoms on December 3, 2001. The letter stated that the
21 medical summary was “based on the input from Ms. Rutherford’s
22 health care providers, laboratory tests, x-rays, Mir’s [sic], clinical
23 observations and physical examination during her office visits.”
24 Symptoms included tender pain points throughout her body.
25 The letter concluded that she suffered from fibromyalgia. At the
26 bottom of the letter, Dr. Kurtz handwrote, “The above letter was
27 prepared by Dawn Rutherford. I feel [that] it is [a] good summary
28 of her condition” (PRUR 666–67).

29 (4) Dr. Jack Waxman wrote a brief letter on January 17, 2002,
30 that confirmed a diagnosis of fibromyalgia (PRUR 512).

31 (5) On December 20, 2001, Dr. Jeffrey Mandel wrote a detailed
32 medical report on Ms. Rutherford. He reported on the results of a
33 sleep study, which showed that Ms. Rutherford had a 74% reduced
34 sleep efficiency. Sleep problems were often found in people with
35 fibromyalgia. He also described his diagnosis of fibromyalgia
36 after he examined Ms. Rutherford. She experienced widespread
37 pain, tender points, numbness, and limited dexterity. Specifically,
38 after one exam, he noted that she experienced “widespread pain in
39 the left and right side of the body; pain upon digital palpation of

1 the occiput, low cervical, trapezius, supraspinatus, second rib,
2 gluteal, greater inronchanter bilateral, posterior to the trochanteric
3 prominence, and knee tender points performed with an
4 approximated exerted force of 4kg. I observed the patient
5 express pain upon digital palpitation of the above tender points”
(PRUR 526–31).

6 (6) On January 8, 2002, Dr. L. Sloane Polillo wrote a letter
7 about Ms. Rutherford’s condition. It stated, in relevant part,
8 “Ms. Rutherford has been under my care since December 20, 2001
9 for several disabling conditions including Fibromyalgia, Epstein
10 Barr infection, Chronic Fatigue Syndrome, Degenerative Disc
11 Disease of the cervical and lumbosacral spine and Degenerative
12 Joint Disease . . . In September 2001, Dr. Michael Kurtz
13 diagnosed her with Fibromyalgia and Degenerative Disc Disease
14 of the cervical and lumbosacral spine and Degenerative Joint
15 Disease, based on her disabling symptoms and X-Ray studies.”
16 Dr. Polillo then went on to describe what she observed from her
17 examination of Ms. Rutherford — the patient’s pain, decreased
18 range of motion, tender points throughout her body, and the need
19 to walk with the use of a cane (PRUR 519–20).

20 (7) Dr. Peter Stein wrote on behalf of Ms. Rutherford on January
21 14, 2002, again confirming that she had fibromyalgia (PRUR 516).

22 (8) On February 6, 2002, Dr. Gary P. McCarthy said that it seemed
23 she was suffering from a “post-viral infection with ongoing
24 fibromyalgia” (PRUR 566).

25 (9) On March 28, 2002, Dr. Polillo reiterated the conclusions from
26 her January 2002 letter. She said that “sleep disturbances can be
27 consistent with Fibromyalgia and can certainly lead to disabling
28 fatigue and may also contribute to Ms. Rutherford’s degree of
29 pain” (PRUR 446–47). *See also* PRUR 513, 534–35 (results of
30 the sleep study).

31 (10) Dr. Audra Lehman referred the case to Dr. Erskine.
32 Dr. Erskine examined Ms. Rutherford. In a letter dated
33 September 3, 2002, to Dr. Lehman, Dr. Erskine wrote about her
34 pain and sleep disorder. He diagnosed her with fibromyalgia
35 (PRUR 440–41). Dr. Erskine worked with Ms. Rutherford through
36 March 2005. The record shows that Dr. Erskine found the patient
37 continuing to suffer from pain, depression, and sleep disorder
38 (PRUR 282–48).

39 (11) Dr. Lehman, who had assumed care of Ms. Rutherford from
40 Dr. Polillo, wrote a letter on April 25, 2003. She said that there
41 was no improvement in Ms. Rutherford’s condition and that
42 plaintiff still suffered from pain, decreased mobility, and
43 tenderness (PRUR 429).

44 This order also takes note that Dr. Kurtz provided a writing where he reported “multiple trigger
45 points” and “prescribed “physical therapy” (PRUR 481). In her memorandum, Ms. Rutherford
46 says that her fibromyalgia was diagnosed by, among other things, the eighteen-point test

1 (Opp. 22). She does not cite to the record, however. This order finds that she has
2 nonetheless provided enough evidence to support denial of summary judgment in Prudential's
3 favor. For example, Dr. Polillo wrote how Dr. Kurtz diagnosed her with the illness "based on
4 her disabling symptoms and X-ray studies." The results of a sleep study showed symptoms
5 consistent with a diagnosis of fibromyalgia. She has provided comments from physicians who
6 noted that she expressed pain when palpated at different points and that she had
7 "multiple trigger points."

8 This order finds that there is a genuine issue of material fact with respect to the
9 diagnosis and how much Ms. Rutherford suffered. On the one hand, Prudential has provided
10 evidence showing that Ms. Rutherford's disability claim might arise from self-reported
11 symptoms and "symptom magnification." On the other hand, while much of plaintiff's
12 evidence consists of conclusory statements made by physicians writing on her behalf (or by
13 plaintiff herself, with a physician's signature at the end of the letter), there is still evidence that
14 doctors performed clinical exams. Giving the record *de novo* review, this order finds that there
15 is not enough evidence to grant summary judgment in favor of either side. Because summary
16 judgment is denied on these grounds, this order need not reach Ms. Rutherford's other claims of
17 chronic fatigue syndrome, medication side effects, and inability to work in another occupation.²

18 **3. INJUNCTIVE RELIEF.**

19 In her complaint, Ms. Rutherford makes two claims — one for damages (pursuant to
20 29 U.S.C. 1132(a)(1)(B)) and another for injunctive relief (pursuant to 29 U.S.C. 1132(a)(3)).

21

22 ² Plaintiff argues that the "reasonable expectations" doctrine applies. At oral argument, she argued
23 that, because Prudential did not address this issue, she is entitled to summary judgment on this ground.
24 According to the Ninth Circuit, "[i]n general, courts will protect the reasonable expectations of applicants,
25 insureds, and intended beneficiaries regarding the coverage afforded by insurance carriers even though a
careful examination of the policy provisions indicates that such expectations are contrary to the expressed
intention of the insurer." *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 386 (9th Cir. 1994).
Because Ms. Rutherford's expectation of coverage was reasonable under the circumstances, she says,
Prudential should have paid her benefits. This order disagrees. In *Saltarelli*, the court of appeals also stated that
"[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must
make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious
their relationship to other policy terms, and must bring such provisions to the attention of the insured." *Ibid.*
The record shows that Prudential did include exclusionary clauses in its policy. The circumstances of this case
do not warrant *sua sponte* summary judgment in plaintiff's favor.

1 According to 29 U.S.C.1132(a)(1)(B), a civil action may be brought by a participant or
 2 beneficiary “to recover benefits due to him under the terms of his plan, to enforce his rights
 3 under the terms of the plan, or to clarify his rights to future benefits under the terms of the
 4 plan.” Under 29 U.S.C. 1132(a)(3), a civil action may be brought “by a participant, beneficiary,
 5 or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or
 6 the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such
 7 violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”
 8 Ms. Rutherford argues that the most that the Court could do for Prudential would be to order
 9 partial summary judgment because Prudential failed to address her second claim for injunctive
 10 relief.³

11 This order disagrees. According to *Ford v. MCI Communications Corp. Health &*
 12 *Welfare Plan*, 399 F.3d 1076, 1083 (9th Cir. 2005):

13 The Supreme Court has held that “[29 U.S.C. § 1132(a)(3)]
 14 is a catchall provision that acts as a safety net, offering
 15 appropriate equitable relief for injuries caused by violations that
 16 [29 U.S.C. § 1132] does not elsewhere adequately remedy.”
 Because [the plaintiff] asserted specific claims under 29 U.S.C.
 §§ 1132(a)(1)(B) and 1132(a)(2), she cannot obtain relief under
 29 U.S.C. § 1132(a)(3), ERISA’s “catchall” provision.

17 *See also Varsity Corp. v. Howe*, 516 U.S. 489, 515 (1996). Here, Ms. Rutherford has a
 18 straightforward wrongful-termination-of-benefits claim. She seeks an award of benefits under
 19 subsection (a)(1)(B) and injunctive relief under subsection (a)(3). Because she has asserted
 20 claims under subsection (a)(1)(B), Ms. Rutherford has an adequate remedy and cannot therefore
 21 obtain relief under subsection (a)(3).

22 **4. REQUEST FOR FURTHER DISCOVERY.**

23 In the event that summary judgment is not entered in her favor, Ms. Rutherford requests
 24 that she be granted leave to conduct further discovery under FRCP 56(f). “The requesting party
 25 must show: (1) it has set forth in affidavit form the specific facts it hopes to elicit from further
 26 discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose

27
 28 ³ The second claim in the complaint is “for injunctive relief, pursuant to 2 U.S.C. §1132(3).”
 Because there is no such code provision, this order assumes that Ms. Rutherford meant to write, “pursuant to
 29 U.S.C. § 1132(a)(3),” which provides for injunctive or other equitable relief.

1 summary judgment.” *Family Home and Finance Center, Inc. v. Fed. Home Loan Mtg. Corp.*,
2 525 F.3d 822, 827 (9th Cir. 2008).

3 Plaintiff argues that she should be allowed to augment the record regarding any conflict
4 of interest. She notes that Prudential’s stipulation for *de novo* review — rather than the more
5 defense-favorable abuse-of-discretion standard — was based on its eagerness to foreclose such
6 discovery.

7 Prudential disagrees, saying that the scope of review should be limited to the
8 administrative record. The Ninth Circuit adopted “a scope of review that permits the
9 district court *in its discretion* to allow evidence that was not before the plan administrator.”
10 *Mongeluzo v. Baxter Travenol Long Long Term Disability Benefit Plan*, 46 F.3d 938,
11 943–44 (9th Cir. 1995) (emphasis in original). “[T]he purposes of ERISA . . . warrant
12 significant restraints on the district court’s ability to allow evidence beyond what was
13 presented to the administrator.” *Id.* at 943. A district court should only exercise this discretion
14 “when circumstances clearly establish that additional evidence is necessary to conduct an
15 adequate *de novo* review of the benefit decision. In most cases, where additional evidence is
16 not necessary for adequate review of the benefits decision, the district court should only look at
17 the evidence that was before the plan administrator . . . at the time of the determination.” *Id.* at
18 944. A district court therefore has the discretion to allow extrinsic evidence only when
19 circumstances clearly establish that additional evidence is necessary to conduct an adequate
20 *de novo* review of the benefit decision. In *Opeta v. Northwest Airlines Pension Plan*,
21 484 F.3d 1211 (9th Cir. 2007), the Ninth Circuit provided a non-exhaustive list of
22 “exceptional circumstances where introduction of evidence beyond the administrative record
23 could be considered necessary”:

24 [C]laims that require consideration of complex medical
25 questions or issues regarding the credibility of medical experts;
26 the availability of very limited administrative review procedures
27 with little or no evidentiary record; the necessity of evidence
regarding interpretation of the terms of the plan rather than specific
historical facts; instances where the payor and the administrator
are the same entity and the court is concerned about impartiality;
claims which would have been insurance contract claims prior to
ERISA; and circumstances in which there is additional evidence

that the claimant could not have presented in the administrative process.

This order holds that Ms. Rutherford has sufficiently shown that additional evidence is necessary to conduct an adequate *de novo* review. In the instant action, Ms. Rutherford is concerned about the credibility of Dr. Kimelman, one of the medical examiners who concluded she exhibited “symptom magnification.” Accordingly, this order finds that Ms. Rutherford’s request to augment the record is warranted.

Ms. Rutherford may take the deposition of Dr. Kimelman. She also seeks to take the deposition of James Furman (who issued the final denial of benefits and arranged for medical and vocational reviews in this matter) and documentary materials as “described in Ms. Rutherford’s complaint in this matter at paragraphs 14 through 17” (Johnston Decl. ¶ 5).⁴ It is unclear, however, why these items are necessary. Her requests are overbroad. Plaintiff may take Mr. Furman’s deposition *only if* she deposes Mr. Kimelman and shows that Mr. Furman is needed to impeach Mr. Kimelman. With respect to the materials described in her complaint, Prudential has already provided Ms. Rutherford with a copy of her short-term and long-term disability policies, saying that this was sufficient to meet her requests. Again, it is unclear from the record why these materials are needed or why Prudential’s proffer was insufficient. Accordingly, discovery will not be granted with respect to the materials cited in the complaint.

CONCLUSION

⁴ In her complaint, Ms. Rutherford claims that Prudential omitted the following: “[c]omplete copies of all pertinent documents, including without limitation the group disability insurance policy under discussion, the applicable Summary Plan Description, any amendments or alterations to any such documents, and any and all other documentation under which the policy in question may be or may have been administered (which in turn includes copies of any claims manuals, training materials, and the like pertinent to guidance provided to Prudential personnel in processing and evaluating claims for benefits)”; “[m]aterials demonstrating compliance with the administrative processes and safeguards required pursuant to 29 CFR 2560.503-1(b)(5) (requiring that ‘claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently to similarly situated claimants of this section in making the benefit determination’); and “[m]aterials constituting statements of policy or guidance with respect to the plan concerning the denied benefit for Ms. Rutherford’s diagnoses, without regard to whether such advice or statement was relied upon in making the benefit determination” (Compl. ¶ 15).

1 For the foregoing reasons, the motion for summary judgment is **GRANTED IN PART AND**
2 **DENIED IN PART**. Ms. Rutherford can proceed on her claim under 29 U.S.C. 1132(a)(1)(B)
3 (award of wrongfully-terminated benefits) but not on her claim under 29 U.S.C. 1132(a)(3)
4 (injunctive relief). Plaintiff's motion for leave to conduct discovery pursuant to FRCP 56(f)
5 is **GRANTED IN PART AND DENIED IN PART**. She can take the deposition of Dr. Kimelman.
6 Following the deposition of Dr. Kimelman, she can take Mr. Furman's deposition only if she
7 shows that it is necessary to impeach Dr. Kimelman. The other request for discovery is denied.
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9 **IT IS SO ORDERED.**

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11 Dated: July 18, 2008.

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14 WILLIAM ALSUP
15 UNITED STATES DISTRICT JUDGE
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